No. _____

In the Supreme Court of the United States

STATE OF ARIZONA and JANICE K. BREWER,
Governor of the State of Arizona, in her official capacity,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) to address the illegal immigration crisis in the State. The four provisions of S.B. 1070 enjoined by the courts below authorize and direct state law-enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law and impose penalties under state law for non-compliance with federal immigration requirements.

The question presented is whether the federal immigration laws preclude Arizona's efforts at cooperative law enforcement and impliedly preempt these four provisions of S.B. 1070 on their face.

PARTIES TO THE PROCEEDINGS

Petitioners, the State of Arizona and Governor Janice K. Brewer, were the appellants in the court below. Respondent, the United States, was the appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the State of Arizona and Governor Janice K. Brewer, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 641 F.3d 339, and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the District of Arizona is reported at 703 F. Supp. 2d 980, and reproduced at App. 116a.

JURISDICTION

The judgment of the Ninth Circuit was entered on April 11, 2011. App. 1a. On June 30, 2011, Justice Kennedy extended the time for filing a petition for certiorari to and including August 10, 2011. App. 205a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 4 of the Constitution provides that Congress shall have power "To establish an uniform Rule of Naturalization."

Article VI, Clause 2, of the Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ."

The Tenth Amendment to the Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Pertinent provisions of Title 8 of the United States Code and of the Arizona Revised Statutes are reproduced in the Appendix.

INTRODUCTION

Arizona bears the brunt of the problems caused by illegal immigration. It is the gateway for nearly half of the nation's illegal border crossings. 9th Cir. Excerpts of Record ("ER") 380. Unlawful entrants include criminals evading prosecution in their home countries and members of Mexican drug cartels—organizations the federal government has characterized as "more sophisticated and dangerous than any other organized criminal enterprise."[1] Beyond the obvious safety issues, the fiscal burdens imposed by the disproportionate impact of illegal immigration on Arizona are daunting. Arizona spends several hundred million dollars each year incarcerating criminal aliens and providing education and healthcare to aliens who entered and reside in the country in violation of federal law. ER 429. By 2005, the

[1] Majority Staff of the House Committee on Homeland Security Subcommittee on Investigations *A Line in the Sand: Confronting the Threat at the Southwest Border*, http://www.house.gov/sites/members/tx10_mccaul/pdf/Investigations-Border-Report.pdf

illegal immigration problem was so severe that then-Governor Janet Napolitano (currently the Secretary of Homeland Security) declared a state of emergency in Arizona.[2] Arizona has repeatedly asked the federal government for more vigorous enforcement of the federal immigration laws, but to no avail.

To address the unique and disproportionate impact of illegal immigration on Arizona, Governor Brewer signed the Support Our Law Enforcement and Safe Neighborhoods Act ("S.B. 1070") on April 29, 2010. S.B. 1070, as amended, aims to ensure more effective enforcement of the federal immigration laws in Arizona, consistent with the requirements of federal law and the U.S. Constitution. Arizona was acutely aware of the need to respect federal authority over immigration-related matters. The legislation authorizes cooperative law enforcement and imposes sanctions that consciously parallel federal law. Despite that effort, the United States took the extraordinary step of initiating a suit to enjoin the law on its face before it ever took effect. That extraordinary federal effort to enjoin a duly enacted state law underscores the importance of this case. Moreover, the Ninth Circuit opinion enjoining four crucial provisions of Arizona's law creates an express split among the Courts of Appeals on an issue of vital importance, casts constitutional doubt on dozens of

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[2] Ralph Blumenthal, *Citing Border Violence, 2 States Declare a Crisis*, N.Y. Times, Aug. 17, 2005, http://query.nytimes.com/gst/fullpage.html?res=9C0CE2DF133EF934A2575BC0A9639C8B63&pagewanted=all.

statutes enacted by other States, and conflicts with this Court's precedents in several respects. This Court's review is clearly warranted.

STATEMENT OF THE CASE

A. Federal Immigration Law

The federal immigration laws expressly contemplate and authorize cooperative law enforcement efforts between federal and state officials. Indeed, they mandate federal cooperation with state and local efforts to ascertain individuals' immigration status.

The principal federal statute dealing with immigration is the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* ("the INA"), which has been amended on numerous occasions, including by the Immigration Reform and Control Act, 100 Stat. 3359 ("IRCA"), which addressed the employment of aliens in the United States. The INA "set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *De Canas v. Bica*, 424 U.S. 351, 359 (1976)). IRCA addressed the employment of aliens not authorized to work, a field the original INA had largely left to the States. *See Whiting*, 131 S. Ct. at 1974-75.

The INA both expressly authorizes specific cooperative law enforcement and acknowledges that such cooperative efforts do not require express federal statutory authorization. In particular, the INA

includes provisions to deputize state officials to perform the functions of federal immigration officers. 8 U.S.C. § 1357(g)(1)-(9). But it also includes a savings clause underscoring that this specific authorization neither excludes other cooperative efforts nor suggests that federal statutory authorization is necessary for state and local officials to assist in the enforcement of federal immigration laws. § 1357(g)(9)-(10). Subsection 1357(g)(10) specifically provides that

> [n]othing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State (A) to communicate with the Attorney General regarding the immigration status of any individual . . . ; or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

Another provision, 8 U.S.C. § 1373(c), mandates federal officials to respond to inquiries generated by state and local law enforcement. That section provides that federal authorities "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." And § 1373(a) prohibits any restriction on the authority of state and local gov-

ernments to send to or receive from "the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States." *See also* §§ 1373(b), 1644. In order to fulfill these statutory mandates, for more than a decade the federal government has maintained a Law Enforcement Support Center (LESC), a 24-hour-a-day, 365-day-per-year centralized database and response service, which "provides timely customs information and immigration status and identity information and real-time assistance to local, state and federal law enforcement agencies on aliens suspected, arrested or convicted of criminal activity."[3]

The INA also requires every alien present in the United States for longer than 30 days (except for foreign diplomats and members of their households, *see* 8 U.S.C. § 1303(b)) to apply for registration documents verifying their lawful status, and to carry those documents at all times. 8 U.S.C. § 1302. Failure to apply is a federal misdemeanor punishable by up to six months' imprisonment and a $1000 fine, § 1306(a), and failure to carry the registration documents is a misdemeanor punishable by up to 30 days' imprisonment and a $100 fine. § 1304(e).

The INA authorizes the Attorney General to investigate, apprehend and detain removable aliens.

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[3] U.S. Immigration and Customs Enforcement, *Law Enforcement Support Center*, www.ice.gov/lesc/.

8 U.S.C. §§ 1226, 1357. Federal law is largely silent regarding state enforcement authority in this regard, but 8 U.S.C. § 1252c expressly authorizes state and local officials, if acting with confirmation from the INS, to arrest unlawfully-present aliens who have reentered the country after leaving or being deported following the commission of a felony.

IRCA addresses the problem of the unlawful employment of illegal immigrants from the demand side. It prohibits employers from hiring or employing aliens who are not authorized to work. 8 U.S.C. §§ 1324a(a) & 1324a(e)(4). IRCA also requires employers to follow certain employment-authorization verification procedures, *see* § 1324a(b), compliance with which provides an affirmative defense to the hiring of an unauthorized alien, § 1324a(a)(3). IRCA permits the use of these verification documents for the enforcement of federal work-authorization law, or federal perjury and similar laws, but prohibits their use for other purposes. § 1324a(b)(5) & (d)(2)(F). IRCA contains an express preemption provision, § 1324(h)(2):

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

IRCA does not address unlawful employment on the supply side, *i.e.*, by imposing sanctions on illegal immigrants who seek and obtain work in violation of

federal law, and IRCA's preemption provision does not reach such state laws.

B. Arizona's S.B. 1070

S.B. 1070 was signed by Governor Brewer on April 23, 2010, and was clarified and revised a week later by Arizona H.B. 2162, 2010 Ariz. Sess. Laws ch. 211. The statute reflects a comprehensive effort to deal with the disproportionate impact of illegal immigration on Arizona. While the United States initially sought to enjoin numerous sections of S.B. 1070, it was only successful in enjoining the four provisions at issue here: Sections 2(B), 3, 5(C), and 6.

Section 2, Ariz. Rev. Stat. § 11-1051, is designed to facilitate communications between federal, state and local officials regarding potential violations of the federal immigration laws. Section 2(B) provides that "[f]or any lawful stop, detention or arrest made" by Arizona law enforcement, "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person." Section 2(B) further provides that "[a]ny person who is arrested shall have the person's immigration status determined," *i.e.*, verified by the federal government pursuant to 8 U.S.C. § 1373(c), "before the person is released." Section 2 must be implemented "in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons

and respecting the privileges and immunities of United States citizens." § 2(L).

Section 3, Ariz. Rev. Stat. § 13-1509, reinforces the federal alien registration laws by providing that "[i]n addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 [U.S.C. §§] 1304(e) or 1306(a)." § 3(A). Subsection 3(H) imposes the same maximum penalties for violations of subsection (A) that Congress has imposed for violations of 8 U.S.C. § 1304(e), which in turn are less than the penalties for violations of § 1306(a). The only substantive difference between Section 3 and the federal statutes is that Section 3 has no application at all to persons authorized to be in the United States. § 3(F).

Section 5(C) of S.B. 1070, Ariz Rev. Stat. § 13-2928(C), reinforces the federal prohibitions on unauthorized employment directed to the demand side of employers by addressing the supply side of would-be employees. That provision makes it a misdemeanor under Arizona law for "a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state."

Section 6, Ariz. Rev. Stat. § 13-3883(A)(5), adds to Arizona peace officers' warrantless arrest authority by authorizing such arrests when "the officer has probable cause to believe . . . [t]he person to be

arrested has committed any public offense that makes the person removable from the United States."

C. Proceedings Below

1. On July 6, 2010, the United States took the extraordinary step of seeking to enjoin S.B. 1070 before it could take effect. On July 28, 2010, just a day before S.B. 1070's effective date, the district court preliminarily enjoined enforcement of Sections 2(B), 3, 5(C), and 6. App. 122a-23a.

2. Arizona appealed the injunction to the Ninth Circuit under 28 U.S.C. § 1292(a)(1). The panel divided with respect to Sections 2(B) and 6, but unanimously affirmed the District Court regarding Sections 3 and 5(C).

The Ninth Circuit began its legal analysis by acknowledging both that the federal government had brought a facial challenge and that under *United States v. Salerno*, 481 U.S. 739 (1987) a successful facial challenge requires "the challenger [to] establish that no set of circumstances exists under which the Act would be valid." App. 132a. Nonetheless, the majority expressly declined to determine whether there were constitutional applications of S.B. 1070's contested provisions and instead concluded that "there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent." *Id.* at 7a & n.4.

As to Section 2(B), the Ninth Circuit began its analysis by rejecting Arizona's interpretation of its own statute, and interpreting it instead to maximize the number of situations in which state law enforcement authorities would contact federal officials. Then, despite the express savings clause in 8 U.S.C. § 1357(g)(10), the majority interpreted § 1357(g)(1)-(9)'s grant of authority to the Attorney General to deputize state law enforcement officers in certain circumstances as precluding other state efforts. The Ninth Circuit held that this grant "demonstrates that Congress intended for state officers to systematically aid in immigration enforcement *only* under the close supervision of the Attorney General." App. 17a (emphasis added). The majority acknowledged the savings clause, and that 8 U.S.C. §§ 1373 and 1644 expressly permit communications between state and federal authorities regarding possible immigration violations. Nonetheless, the majority focused on 8 U.S.C. § 1357(g)(1)-(9), and concluded that state authorities can communicate with federal authorities only "when the Attorney General calls upon state and local law enforcement officers—or such officers are confronted with the necessity—to cooperate with federal immigration enforcement on an incidental and as needed basis." App. 15a. Accordingly, Section 2(B) was preempted.

The Ninth Circuit then found Section 3 likely preempted by viewing 8 U.S.C. §§ 1304 and 1306 as "a comprehensive scheme for immigrant registration." App. 28a. The Court concluded that Congress

did not "intend[] for states to participate in the enforcement or punishment of federal immigration registration rules." App. 29a.

As to Section 5(C), the Ninth Circuit began by acknowledging that this employment provision addresses an area of traditional state authority and so the presumption against preemption applies. App. 41a. Nevertheless, it relied on Circuit precedent to construe Congress' decision to focus on the demand side and sanction only employers as precluding States from enacting complementary sanctions directed to employees. "Congress's inaction" in IRCA "in not criminalizing work, joined with its action of making it illegal to hire unauthorized workers," according to the majority, implies Congress necessarily "intended to prohibit states from criminalizing work." App. 39a. The court did not discuss the reach and implications of the limited express preemption provision in 8 U.S.C. § 1324a(h).

The panel professed itself bound by the Ninth Circuit's decision in *National Center for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991) ("*NCIR*"), that Congress had not empowered the INS to prohibit work by aliens pending their deportation proceedings, because Congress intended to sanction employers only. The panel did not acknowledge this Court's holding in reversing *NCIR*—that the no-work bond conditions at issue there *were* consistent with Congress' intent "to preserve jobs for American workers,"

which "was forcefully recognized . . . in the IRCA." 502 U.S. at 194 & n.8. Nor did the panel explain why a limitation on the INS, which like all federal agencies depends on statutory authorization, would apply to States who enjoy both plenary power and the presumption against preemption in areas of traditional state authority. App. 34a-35a ("[W]e do not believe that we can revisit our previous conclusion about Congress' intent simply because we are considering the effect of that intent on a different legal question.").

Finally, in addressing Section 6, the panel majority held that "states do not have the inherent authority to enforce the civil provisions of federal immigration law," App. at 45a. The Ninth Circuit acknowledged the contrary view of the Tenth Circuit, but disagreed and created an acknowledged and open conflict with *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999). Because the majority found inherent or plenary authority lacking, it demanded express federal statutory authority for Section 6. It found such authority absent because 8 U.S.C. § 1252c permits state officers to arrest aliens who have been convicted of crimes and deported (or have voluntarily departed) but returned to the United States, but only in more limited circumstances. "Section 6 significantly expands the circumstances in which Congress has allowed state and local officers to arrest immigrants." App. 44a-45a. Based on its unusual approach to facial challenges in the preemption context, the majority did not address Arizona's

argument that, because § 1252c clearly authorized *some* arrests permitted by Section 6, the latter had constitutional applications and could not be facially invalidated.

The majority buttressed its preemption conclusion by referring to criticisms of S.B. 1070 "attributable to foreign governments," which the majority viewed as demonstrating that S.B. 1070 "thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs." App. 26a.

3. Judge Noonan issued a concurring opinion emphasizing that S.B. 1070 had engendered complaints from foreign governments, which should, in his view, weigh heavily in the preemption analysis. App. 55a.

4. Judge Bea dissented as to Sections 2(B) and 6 and specifically distanced himself from some of the panel majority's broader reasoning. As to Section 2(B), Judge Bea emphasized that both the savings clause in § 1357(g)(10) and §1373(c)'s mandatory duty on federal officials to respond to requests by state law enforcement foreclosed the majority's effort to read the express authorization for deputization in § 1357(g)(1)-(9) as implicitly precluding other cooperative efforts. App. 93a. Judge Bea further recognized that "because this is a facial challenge, [the court] must assume that Arizona police officers will comply with federal law and the Constitution in executing Section 2(B)." App. 86a.

Judge Bea also dissented as to Section 6. He took issue with the majority's reasoning that States lack inherent authority to enforce federal civil immigration laws. He found the majority's view inconsistent with, *inter alia*, this Court's decision in *Muehler v. Mena*, 544 U.S. 93, 101 (2005), upholding the authority of state officers to ask individuals they encounter about their immigration status even absent any reasonable suspicion of unlawful conduct. App. 104a. Judge Bea regarded § 1252c as simply codifying a portion of this pre-existing inherent authority without impliedly negating the balance. Judge Bea also noted that Section 6 should survive a facial challenge even under the majority's understanding of state authority, because some of the arrests it authorizes are also expressly permitted by § 1252c. App. 114a.

Finally, Judge Bea disagreed with the panel majority that complaints from foreign officials about S.B. 1070 are relevant to the preemption analysis because they "ha[ve] had a deleterious effect on the United States' foreign relations." App. 22a. Judge Bea argued that "the Executive's desire to appease foreign governments' complaints cannot override Congressionally-mandated provisions," that S.B. 1070 does not conflict with any "established foreign relations policy goal," and that the majority's finding of preemption in this case gave a "heckler's veto" to "other nations' foreign ministries." App. 95a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has completely foreclosed Arizona's effort to address the disproportionate impact of unlawful immigration in a State with a 370-mile border with Mexico. Without even considering whether Arizona's statute was capable of any constitutional application, and expressly rejecting Arizona's limiting construction of its own statute, the Court of Appeals invalidated four key provisions of S.B. 1070 on their face before the statute ever took effect. The Ninth Circuit did not conclude that the entire field of immigration enforcement was preempted. Nor could it have, in light of this Court's precedents and the plain text of the federal immigration statutes expressly inviting cooperative enforcement efforts and compelling federal officials to respond to state and local inquiries about immigration status. Nor does the decision below turn on any express preemption provision. Rather, the Ninth Circuit found Arizona's efforts impliedly preempted on their face, because they conflicted with the congressional purpose the Ninth Circuit divined from various immigration statutes.

That decision turns well-established principles of federalism and facial challenges upside down, and implicates issues of the most fundamental importance. The baseline assumptions of our federal system are that States have inherent, plenary police power and that cooperative law enforcement is the norm. States, unlike federal agencies, are not crea-

tures of the federal Congress and do not depend on federal statutes for authorization. It is, moreover, commonplace for state and federal law to prohibit the same conduct, and this Court has repeatedly emphasized that state officials are primarily governed by state law even when they cooperate with federal law enforcement officials. Thus, a conclusion that States are completely foreclosed from enforcing federal law or from enacting state laws that prohibit conduct made unlawful by Congress could be supported only by the clearest of congressional statements. Here, far from foreclosing such cooperative law enforcement efforts, the federal immigration laws expressly contemplate such cooperation and go so far as to compel federal cooperation with state efforts. The Ninth Circuit nonetheless condemned Arizona's efforts *ab initio* by ignoring savings clauses and a presumption against preemption, and without even considering whether the laws were susceptible of constitutional application.

This Court should review and reverse that decision for three basic reasons. First, this case implicates issues of extraordinary importance, as underscored by the federal government's extraordinary decision to initiate a facial challenge to Arizona's law before it could take effect. No one can deny that the problem of unlawful immigration is significant or that it has a disproportionate impact on border States. It is thus no small matter to conclude, as the Ninth Circuit did, that only the national government in Washington can address this problem.

Second, the decision below creates an express and acknowledged circuit split over the preemptive force of the federal immigration laws. The Tenth Circuit views those laws as affirmatively encouraging cooperative enforcement by States; the Ninth Circuit reads such authorization for specific cooperation as negating any inherent state law enforcement authority.

Third, the decision below is wrong and flatly inconsistent with this Court's precedents. While this Court has repeatedly emphasized that outside of the First Amendment context a law capable of constitutional application is not facially invalid, the Ninth Circuit refused to even consider whether the relevant provisions of S.B. 1070 were capable of any constitutional application. While this Court has emphasized that state efforts to cooperate with the enforcement of federal law are primarily governed by state law and are a healthy component of our federal system, the Ninth Circuit viewed such efforts with what amounts to a presumption of unconstitutionality. And while this Court has routinely viewed parallel prohibitions—where state and federal law prohibit the exact same conduct—as not implicating issues of preemption whether express or implied, the Ninth Circuit held that state efforts to facilitate enforcement or impose parallel prohibitions on conduct prohibited by federal immigration law are verboten.

I. Arizona's Authority to Enact S.B. 1070 Is a Matter of Pressing Importance

It is widely recognized that the federal immigration laws are not adequately enforced; the President himself has described the federal immigration system as "broken." ER 398. This broken system leaves the people and government of Arizona to bear a disproportionate share of the burden of a national problem.[4] The Arizona border is so porous that an estimated 50% of illegal aliens entering the United States come through the State. ER 384. Its status as a conduit for human and drug smuggling has rendered large areas of southern Arizona highly dangerous. Significant swaths of public lands have become so dangerous that National Park rangers have been forced to patrol with M-16 carbines[5] and public access is forbidden or sternly discouraged. Strongly-worded warning signs are posted as far as 80 miles from the border and only 30 miles from the

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[4] *See* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. Chi. L.F. 57, 80 (2007) (costs of illegal immigration are mostly local while benefits are mostly national).

[5] Ralph Vartabedian, The Law Loses Out at U.S. Parks, L.A. Times, Jan. 23, 2003, http://articles.latimes.com/2003/jan/23/nation/na-ranger23; *see also* Monica Yancy, Our National Parks, May 10, 2007, http://ournationalparks.us/index.php/site/story_issues/budgetwoes_reduce_patrols_assistance_in_parks/ (park rangers voted Organ Pipe Cactus National Monument the nation's most dangerous national parkland, seizing 14,000 pounds of marijuana and engaging in more than 30 car chases there in 2001 alone).

City of Phoenix.[6] Police officers in the border town of Nogales, Arizona have received death threats from Mexican drug cartels. ER 255-56. Private ranchers living near the border constantly face the problems and safety risks associated with a steady flow of illegal crossings of their land. ER 223-31, 405.

Approximately six percent of Arizona's total inhabitants—an estimated 400,000 individuals—are aliens who are unlawfully present and not authorized to work.[7] Nonetheless, over half—230,000—engage in work, composing 7.4% of all Arizona workers.[8]

Moreover, the Arizona Department of Corrections has estimated that criminal aliens now make up more than 17% of Arizona's prison population, and the Maricopa County Attorney's Office notes that 21.8% of the felony defendants in the Maricopa County Superior Court are illegal aliens. ER 264-74 & 419. Arizona spends several hundred million dollars each year incarcerating criminal aliens and providing education and healthcare to aliens who

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[6] *See* ER 162, 165, 167 (photo of warning sign stating "travel not recommended" and that "visitors may encounter armed criminals and smuggling vehicles moving at high rates of speed").

[7] Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, p. 15 tbl.5, pewhispanic.org/files/reports/133.pdf.

[8] *Id.* at 21 tbl. A1.

entered and reside in the country in violation of federal law. ER 429.

While no one can deny that Arizona bears the brunt of the impact of unlawful immigration, the federal government has largely ignored Arizona's pleas for additional resources and help. ER 380-97. Between 2000 and 2010, the number of aliens unlawfully present in Arizona increased an average of 10,000 per year,[9] and yet the federal efforts remain demonstrably inadequate. Thus, while Arizona suffers disproportionate and distinct problems, the Ninth Circuit decision suggests that there is almost nothing Arizona can do to supplement the inadequate federal efforts. The injunction against S.B. 1070 leaves Arizona and its people to suffer from a serious problem without any realistic legal tools for addressing it. Such a conclusion is irreconcilable with the basic tenets of Our Federalism, and border States should not be placed in such an untenable position unless this Court determines that the Constitution and the federal immigration laws demand such a counterintuitive result.

The legal significance of the question presented here extends well beyond Arizona and its particularly dire straits. Although the burden placed on Arizona by illegal immigration is unique, many other

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[9] The unauthorized-alien population rose and fell roughly in line with the fortunes of the economy, peaking at 500,000 between the years 2005 and 2009 before receding somewhat to 400,000 in 2010. Passel & Cohn, n.7 *supra*, at 23 tbl. A3.

States and localities have enacted laws and policies designed to reduce the effects of illegal immigration. At least nine other States have begun requiring that law enforcement officers conduct immigration status checks in various circumstances surrounding investigations, arrests and jail bookings.[10] Many local agencies routinely check the immigration status of suspects or arrestees.[11] At least seven States have

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[10] *See* Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 535 (hereinafter "Alabama TCPA"), § 12 (on reasonable suspicion or booking into custody); *id.* § 19(a) (for persons "charged with a crime for which bail is required" or confined in any "state, county, or municipal jail"); Ga. Code § 42-4-14(b) & (c) (persons confined in jail); Ind. Code § 11-10-1-2(a) ("committed criminal offender[s]"); Mo. Rev. Stat. § 577.680(1) (persons "charged and confined to jail"); Okla. Stat. tit. 22 § 171.2(A) & (B) (felony and DUI suspects confined in jail); Tenn Code. § 40-7-123(a) & (b) (persons confined in jail); S.C. Code § 23-3-1100 (same); S.C. Code § 17-13-170 (on "reasonable suspicion" of unlawful presence during any lawful stop or investigation); Utah Code § 17-22-9.5 (detainees charged with felonies or DUI); Utah Code § 76-9-1003(1)(a)(i) (persons arrested for felonies or serious misdemeanors); R.I. Exec. Order 08-01, ER 147-49 (arrestees and investigatees); David W. Chen & Kareem Fahim, *Immigration Checks Ordered in New Jersey*, N.Y. Times, August 22, 2007 ("criminal suspects"), http://www.nytimes.com/2007/08/23/nyregion/23immig.html.

[11] ER 135-36 (individual officer); 340-41 (59 surveyed State and local jurisdictions "generally" inquire into arrestees' immigration status, while only 34 do not—and many others ask for serious criminals or later in the booking process); *e.g.,* Prince William Cnty., Va. Police Dept. Gen. Order 45.01, *Local Enforcement Response to Illegal Immigration,* http://www.pwcgov.org/docLibrary/PDF/008333.pdf.

expressly empowered their officers to enforce the immigration laws in other contexts as well.[12] In addition to Arizona (in Section 5(C) of S.B. 1070), Alabama and Mississippi have targeted the supply side of the unlawful employment problem by prohibiting the unauthorized acceptance or performance of work by an alien.[13] And like Section 3 of S.B. 1070, Alabama and South Carolina have added state-law prohibitions of violations of the federal alien registration laws.[14] Many of these statutes have become the subject of legal challenges similar to the one against S.B. 1070, although only Arizona and Alabama have prompted the United States to file a declaratory action seeking to enjoin their statutes. *See Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-cv-1804-TWT (N.D. Ga. 2011); *Buquer v. City of Indianapolis*, No. 1:11-cv-708-SEB-MJD (S.D. Ind. 2011); *Hispanic Interest Coalition of Alabama v. Bentley*, No. 5:11-cv-02484-SLB (N.D. Ala. 2011); *Parsley v. Bentley*, No. 5:11-cv-

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[12] Alabama TCPA, § 5(b); Ga. Code § 17-5-100(b); Ind. Code. §§ 5-2-18.2(7)(2), 35-33-1-1(11) & (12); S.C. Code § 23-6-60; Utah Code § 17-22-9.5(3)(b)(ii); Va. Code § 19.2-81.6; Co. Rev. Stat. 29-29-103(2)(a)(I).

[13] *See* Alabama TCPA, § 11(a); Miss. Code § 71-11-3(c)(i) (unauthorized work a felony).

[14] Alabama TCPA, § 10(a); S.C. Code § 16-17-750(A). A number of other States have enacted criminal offenses mirroring other federal immigration offenses, such as human smuggling. *E.g.*, S.C. Code § 16-9-460(C); Okla. Stat. tit. 21, § 446, Utah. Stat. Ann. § 76-10-2701; Ga. Code § 16-5-46.

02736, (N.D. Ala. 2011); *United States v. State of Alabama*, No.2:11-cv-02746-WMA (N.D. Ala.); *Utah Coalition of La Raza v. Herbert*, No. 2:11-cv-401 CW (D. Utah).

The federal government's own response to S.B. 1070 underscores the importance of this case. The President publicly criticized the statute.[15] The Justice Department launched this extraordinary effort to enjoin a duly-enacted state statute on its face before it could take effect and then dispatched its senior Deputy Solicitor General to argue a preliminary injunction motion in district court. Nothing about this lawsuit and these issues is ordinary. These issues strike at the heart of our federal balance. They self-evidently merit this Court's attention.

II. The Decision Below Creates a Split Among the Courts of Appeals.

Over Judge Bea's dissent, the decision below opens an acknowledged and unambiguous split of authority over the power of state law enforcement officers to enforce the civil provisions of immigration law. The split in authority is not limited to that question, but goes to the proper reading of the federal immigration statutes and the fundamental question of the extent

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[15] *E.g.*, White House Office of the Press Secretary, *Remarks by President Obama and President Calderón of Mexico at Joint Press Availability*, May 19, 2010, *available at* www.whitehouse.gov/the-press-office/remarks-presidentobama-and-president-calder-n-mexico-joint-press-availability

to which state law enforcement efforts depend on authorization from federal law.

Courts have long held that state officers may effect arrests based on the commission of an immigration-related crime itself, such as illegal entry or human trafficking. *See, e.g., United States v. Villa-Velasquez*, 282 F.3d 553, 555-56 (8th Cir. 2002). The panel majority here, however, held that state and local officers are not permitted to enforce "the civil provisions of the INA regulating authorized entry, length of stay, residence status, and deportation." App. 46a (emphasis and brackets omitted). This bar includes a prohibition on state investigation or detention of persons based on their status of "civil removability." App 45a.

The majority expressly "recognize[d] that [its] view conflicts with the Tenth Circuit's," App. 48a (citing *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999)). In *Vasquez-Alvarez* the Tenth Circuit considered an arrest that "was based solely on the fact that Vasquez was an illegal alien." 176 F.3d at 1295. The court held that the long-standing rule "that state and local law enforcement officers are empowered to arrest for violations of federal law" gives them "the general authority to investigate and make arrests for violations of federal immigration laws," and that 8 U.S.C. § 1252c's express authorization of arrests in certain circumstances "did not affect this preexisting authority" in other situations. 176 F.3d at 1296-97; *see also United States v. Sali-*

nas-Calderon, 728 F.2d 1298, 1301 & n.3 (10th Cir. 1984) ("A state trooper has general investigatory authority to inquire into possible immigration violations."); *United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001); *United States v. Soto-Cervantes*, 138 F.3d 1319, 1324 (10th Cir. 1998). The Tenth Circuit found its conclusion buttressed by 8 U.S.C. § 1357(g)(10). The Tenth Circuit read that savings clause as a savings clause and viewed it as "a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws." *Vasquez-Alvarez*, 176 F.3d at 1300.

The Ninth Circuit here started from fundamentally different premises and reached the opposite conclusion. Rather than begin with the premise that States enjoy plenary power and state law enforcement officers do not require authorization from the federal Congress, the Ninth Circuit took the opposite approach. It concluded that States have no inherent enforcement power, App. 46a, and that, far from inviting state cooperation, "8 U.S.C. § 1357(g) demonstrates that Congress intended for state officers to systematically aid in immigration enforcement *only* under the close supervision of the Attorney General," App. 17a (emphasis added). Based on that reading of federal law – a reading irreconcilable with the Tenth Circuit's view – the panel found Sections 2(B) and 6 preempted because of an absence of federal authorization for the State's enforcement role. Analogously, the panel found Section 5(C) to be

preempted because nothing in IRCA expressly invites state enforcement of federal work authorization rules, App. 35a, and Section 3 to be preempted because Congress had not authorized States to incorporate federal criminal alien-registration requirements into their own criminal codes. App. 28a-29a.

The Ninth Circuit's rule—that States may not take any investigative or enforcement action against aliens based on their civil violations of the immigration laws without an express permission slip from Congress—directly conflicts with the approach not only of the Tenth Circuit but also of other Circuits. *See*, *e.g.*, *Estrada v. Rhode Island*, 594 F.3d 56, 65 (1st Cir. 2010) (passengers' admission "that they were in the country illegally" permitted extension of traffic stop by Rhode Island officer based on reasonable suspicion that they "had committed immigration violations"); *United States v. Rodriguez-Arreola*, 270 F.3d 611, 617 (8th Cir. 2001) (statement by one occupant of a stopped vehicle that another "was not legally present in the United States" provided reasonable suspicion for South Dakota officer "to inquire into [the other's] alienage"); *United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007) (Virginia State Police officer could contact ICE and extend traffic stop on being told that "passengers were illegal aliens") *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987) (Port of New Orleans

Harbor Police had authority to detain alien stowaways in incoming vessel).[16]

This Court has not directly spoken on this question, although its decision in *Muehler* suggests that the Ninth Circuit's view is mistaken. In *Muehler*, this Court held that no independent justification was required under the Fourth Amendment for a state officer's questioning of an arrestee regarding her immigration status, but did not address whether the questioning was consistent with the federal immigration laws. 544 U.S. at 100-01. In light of the

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[16] The panel majority found support for its view in the Sixth Circuit's decision in *United States v. Urrieta*. App. 46a. There, the court considered an argument that an investigation was justified by the state officer's suspicion that the subject was an unlawful alien, and suggested that the investigation had to be supported by "a reasonable suspicion that [the suspect] was engaged in some nonimmigration-related illegal activity." 520 F.3d 569, 574 (6th Cir. 2008). Although it is debatable whether this was part of the court's holding, as it noted that the government had withdrawn the argument, *id.*, *Urrieta* does illustrate the divergent approaches being taken to these questions, as do the conflicting opinions issued by the Department of Justice Office of Legal Counsel in the last decade. *See* App. at 52a n.24 ("OLC's conclusion about the issue in the 2002 memo was different in 1996 under the direction of President Clinton, and was different in 1989, under the direction of President H.W. Bush."); Memorandum for the Attorney General from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations* (Apr. 3, 2002), ER 346.

Ninth Circuit's decision, it has become urgent that the Court answer this question definitively. In hundreds or thousands of incidents every day, state and local law enforcement officers are given reason to suspect that persons they have encountered are in violation of the federal immigration laws. There is absolutely no reason the legal authority of those state and local officers should turn on the Circuit in which the incident arises. This Court therefore should grant certiorari to resolve the split between the Courts of Appeals on this important issue.

III. The Ninth Circuit's Decision Is Wrong and Conflicts With This Court's Precedents.

This Court has long recognized that "federal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law 'together form one system of jurisprudence, which constitutes the law of the land for the State . . .'" *Haywood v. Drown*, 129 S. Ct. 2108, 2114-15 (2009). There is no "immigration exception" to this rule. This Court has consistently declined to find field preemption in the immigration context, rejecting the possibility that the INA might be so comprehensive as to leave no room for state action, *De Canas*, 424 U.S. at 354-63, and instead focusing on whether an "additional or auxiliary regulation[]" by a State "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 66-67, 68 (1941). It has expressly upheld States' "authority

to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). And as a general matter, this Court has recognized that state law enforcement may enforce federal laws as part of cooperative law enforcement that is a salutary aspect of Our Federalism. *See, e.g., United States v. Di Re*, 332 U.S. 581, 589-90 (1948). The Ninth Circuit's opinion cannot be reconciled with these fundamental tenets of this Court's jurisprudence.

A. The Panel Majority Misapplied This Court's Precedents Concerning Facial Challenges

The Ninth Circuit's approach to this facial challenge cannot be reconciled with this Court's precedents. Under *United States v. Salerno*, 481 U.S. 739, 745 (1987), it is clear that a plaintiff who elects to bring a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." App. 65a. That principle applies with full force in the preemption context. Where a state statute confers discretionary authority on its executive officers—as is obviously the case here—the statute will not be facially preempted unless "there is no possible set of conditions" under which the authority could be exercised "that would not conflict with federal law." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 579-80 (1987).

While the Ninth Circuit acknowledged *Salerno*, it expressly declined to consider whether the challenged provisions of S.B. 1070 had constitutional applications. Instead, it inverted the facial-challenge standard by stating that "there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent and therefore is preempted by the Supremacy Clause." App. 7a.

Not only is the conflict with this Court's precedent stark; it is almost certainly outcome-determinative. With respect to Section 2(B), for example, even the panel majority "agree[d] that . . . Congress contemplated state assistance in the identification of undocumented immigrants" in some circumstances even without the direction of the Attorney General. App. 18a. Under *Salerno* and *California Coastal Commission* that should have been sufficient to reject the facial challenge. Under the Ninth Circuit's novel inverted rule, a few indisputably constitutional applications were not enough.

The majority's mistake was even more stark with respect to Section 6: despite acknowledging that § 1252c expressly permits state authorities to arrest unlawfully-present aliens under some circumstances, App. 43a, the majority found Section 6 preempted solely because it would *permit* (but does not require) some arrests that "expand the scope of § 1252c," App. 44a n.20. The Ninth Circuit likewise failed to consider constitutional applications of

Sections 3 and 5(C) in light of its inverted rule for facial challenges.

The Ninth Circuit's analysis cannot be reconciled with *Salerno* and *California Coastal Commission*. The Court should grant certiorari to vindicate its facial challenge precedents.

B. The Ninth Circuit's Decision Conflicts With This Court's Immigration Preemption Decisions

This Court has already rejected the argument that States have no role in enforcing federal immigration law in *Plyler* and just last Term in *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011). The decision below cannot be reconciled with those precedents or with other preemption precedents of this Court.

At every turn, the Ninth Circuit viewed state enforcement of the federal immigration laws as an anomaly that required express authorization in federal law. Because cooperative law enforcement is the norm, not some anomaly, the Ninth Circuit approach could only be justified if immigration were an area of quasi-field preemption that States could only enter with express federal permission. This Court has never adopted that view, and it has articulated the contrary view, including quite dramatically in *Whiting*.

In *Whiting*, the Court considered the validity of another Arizona statute intended to combat unau-

thorized employment by aliens—this time by suspending or revoking the licensures of any businesses that knowingly employed unauthorized aliens—in light of IRCA's express preemption of "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). The Arizona statute contained a broad definition of the "licenses" subject to suspension or revocation, including "articles of incorporation, certificates of partnership, and grants of authority to foreign companies to transact business in the State," *Whiting*, 131 S. Ct. at 1978 (quoting Ariz. Rev. Stat. § 23-211(9)(a)). This Court held "that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted." *Whiting*, 131 S. Ct. at 1981.

The Court also rejected an implied preemption argument premised on the view that immigration is a matter of nearly exclusive federal concern. The court found conflict preemption concerns misplaced. Because "Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Id.* The Court found particularly relevant that "Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects," having "adopt[ed] the federal definition of who

qualifies as an 'unauthorized alien,'" and expressly defined work authorization and the substantive prohibitions on employment by federal standards in order to prevent "conflict between state and federal law as to worker authorization." *Id.* The Court also rejected a contention that "the harshness of Arizona's law . . . impermissibly upsets [the] balance" of sanctions struck by Congress in IRCA. *Id.* at 1983.

As in *Whiting*, each section of S.B. 1070 at issue here avoids conflict concerns by adopting the relevant federal definitions of unlawful presence, work authorization, and registration requirements, and requires Arizona law enforcement officials to follow federally-established procedures for identifying unauthorized aliens. Moreover, as in *Whiting*, Sections 2(B) and 6 of S.B. 1070 are intended to operate within the scope of an express savings clause in the federal immigration statutes, § 1357(g)(10), which expressly reserves the authority of state officials "to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."

C. The Ninth Circuit's Decision Conflicts With This Court's Preemption Precedents

The decision below conflicts with this Court's preemption precedents in at least three respects. It misapplies the presumption against preemption;

inverts a savings clause; and finds conflict preemption of state laws that parallel federal requirements.

One of the "cornerstones of [this Court's] preemption jurisprudence" is the rule that

> in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 129 S. Ct. 1187, 1194-95 (2009) (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotation marks and alterations omitted)). The Ninth Circuit wrongly found this rule inapplicable with respect to Sections 2(B), 3, and 6 of S.B. 1070, and gave it only lip service with respect to Section 5(C).

With respect to Sections 2(B), 3, and 6, the panel majority concluded that "[t]he states have not traditionally occupied the field of identifying immigration violations," App. 12a (discussing Section 2(B)), "punishing unauthorized immigrants for their failure to comply with federal registration laws," App. 28a (Section 3), or "arresting immigrants for civil immigration violations," *id.* at 43a (Section 6). This approach fundamentally distorts the state function involved. If one views the relevant field at a level of generality that focuses on the federal issue – *e.g.*, not

law enforcement or arrest authority but law enforcement and arrest authority for federal crimes – then the relevant field can always be stated in ways that minimize state authority.

That view is mistaken in general and cannot be reconciled with the federal immigration statutes. In 8 U.S.C. §§ 1373, 1357(g), and 1252c, Congress has indisputably recognized that the States have substantial authority to enforce the federal immigration laws in conjunction with their broad, pre-existing law enforcement duties. In light of the States' traditional authority over law enforcement matters, including the cooperative enforcement of federal law, and the numerous recognitions of that state role in federal immigration law, the presumption against preemption should have applied to Sections 2(B), 3, and 6. Nonetheless, the Ninth Circuit found it wholly inapplicable.

Although the panel acknowledged the applicability of the presumption against preemption with respect to Section 5(C) of S.B. 1070, it then proceeded to ignore it. It noted that "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of nonpreemption applies." App 33a. Nonetheless, and even though IRCA itself is silent on complementary supply side efforts to address would-be employees, the Ninth Circuit professed itself bound by its previous holding in *NCIR* that IRCA does not permit the *federal* INS to prohibit work pending the

determination of an alien's deportability. App. 35a. Even putting to one side the reality that *NCIR* was reversed by this Court on other grounds, the Ninth Circuit's reliance on *NCIR* was mistaken for reasons that demonstrate its failure to honor the presumption. States, unlike federal agencies, do not depend on federal statutes for their authority. If the presumption against preemption means anything, it means that States and federal agencies are not similarly situated when it comes to the negative implication to be drawn from an express authorization of particular conduct.[17]

The conflict with this Court's preemption precedents runs far deeper than just the Ninth Circuit's misapplication of the presumption against preemption. The court also violated the cardinal principle of preemption analysis – that congressional intent governs – by reading a savings clause expressly preserving state authority out of the statute. "[T]he purpose of Congress is the ultimate touchstone in every preemption case." *Wyeth*, 129 S. Ct. at 1194 (quoting *Lohr,* 518 U.S. at 485). The presence of a

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[17] As further evidence of its complete abandonment of the presumption, the panel relied on preemption cases from the foreign-relations context—the opposite end of the federalism continuum—for the proposition that Section 5(C)'s supposed "adopt[ion] of a different technique" from IRCA "undermines the congressional calibration of force," and is therefore preempted. App. 40a (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003); citing *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 369-80 (2000)).

saving clause reflects a congressional determination in favor of nonuniformity within its scope. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871 (2000). Despite these well-settled principles and Congress' clear direction in 8 U.S.C. § 1357(g)(10) that the deputization provisions in § 1357(g)(1)-(9) not be construed to limit pre-existing state efforts at cooperative law enforcement, the Ninth Circuit did precisely what Congress warned against. That conclusion is irreconcilable with both Congress' intent and this Court's preemption precedents.

Finally, the Ninth Circuit further departed from this Court's precedents by treating state law provisions that expressly parallel federal law requirements as the basis for finding conflict preemption. This Court's cases have routinely rejected the argument that state law requirements that parallel federal law prohibitions are a basis for preemption. *See Medtronic*, 518 U.S. at 481 (quoting 21 U.S.C. § 360k(a)(1)); *id.* at 495 (*no* preemption of state "requirements" that duplicate FDA requirements); *Wyeth*, 127 S. Ct. at 1187; *Altria Group v. Good,* 129 S. Ct. 538, 541 (2008). Instead, this Court has been quite reluctant to find preemption in the absence of a divergence in substantive requirements and based only on a conflict with the "federal remedial scheme." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 267 (1984); *see also Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008) (States may "provid[e] a damages remedy for claims premised on a violation of FDA regulations;" the state duties in such a case "parallel,

rather than add to, the federal requirement"). The one exception has been in the realm of sanctions against foreign governments, but as explained *infra*, the Ninth Circuit's invocation of such cases is just one more way in which its approach is in conflict with this Court's precedents.

D. The Ninth Circuit's Foreign-Affairs Preemption Analysis Is Erroneous.

Finally, over Judge Bea's strenuous dissent, the panel majority deviated from this Court's precedents by allowing complaints by foreign government officials and the disagreement of the Executive Branch to trump congressional intent. This approach is in conflict with this Court's decision in *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298 (1994).

In *Barclays*, as here, a number of foreign governments and officials had "deplor[ed] [a California statute] in diplomatic notes, *amicus* briefs, and even retaliatory legislation," *id.* at 320; and the Secretary of State himself had noted the volume of complaints, *id.* at 324 n.22. This Court nonetheless rejected the relevance of these protests to the preemption analysis, holding that in the absence of evidence of preemptive Congressional intent, the contention that the statute "is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum." *Id.* at 327-28. The Court also rejected the contention that "a series of Executive Branch actions, statements, and *amicus*

filings . . . constitute a 'clear federal directive proscribing States' use of [the tax method in question]," *id.* at 328, noting that "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations,'" *id.* at 329, and that therefore "Executive Branch communications that express federal policy but lack the force of law" cannot preempt an otherwise-valid state statute in that field. *Id.* at 330.

The Ninth Circuit invoked this Court's decision in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 383-84 (2000). But *Crosby* involved sanctions against foreign governments. Immigration is different. Like the tax context of *Barclays*, but unlike the context of sanctions against Burma, immigration has serious (and disproportionate) domestic consequences and is not solely a matter of the vast external realm. Allowing foreign protests to trump the plenary power of the States in a matter with such profound domestic consequences as immigration would fundamentally reshape our federalist system. Such a significant reordering should not come from the Court of Appeals. This case clearly merits this Court's plenary review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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